

Response to the Symposium Participants

Peter H. Schuck[†]

It is both fitting and gratifying that *Diversity in America*¹ has elicited such richly diverse comments from the Symposium participants. Their contributions teach me about some of the implications of my own book. More important, they refine and advance the debates that I had hoped to provoke in writing it. For all this, I am indebted to the participants, and I offer my responses in the same constructive, analytical spirit that their comments so admirably exhibit. I shall try to do so without repeating much of what I wrote in the book. One purpose of this Symposium, after all, is to get non-participants to pick it up and read it.

WILLIAM GALSTON

I agree with virtually everything that William Galston writes in his comment. Particularly compelling is his final point. It is important, he observes there, to consider the many prudential difficulties entailed in efforts to promote diversity (as distinguished from the easier task of protecting it), but, his argument continues, we must not “turn these prudential difficulties into matters of general principle.”² Galston makes this observation in the course of agreeing with me both that these difficulties are profound and “that liberal societies ought not to regard fostering diversity as an end in itself,” but then he goes on to insist that

to the extent that the promotion of diversity serves as a means for the attainment of legitimate liberal purposes, there is in principle no reason why the law cannot do so. If it is true that integration, not merely non-discrimination, in public education is needed to achieve the promise of equal citizenship and civic unity, then the public effort to create schools in which races and ethnic groups learn and play together cannot be dismissed as a misunderstanding of the rule of law.³

For this reason, Galston is right that a “distinction between coercive

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1. PETER H. SCHUCK, *DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE* (2003).

2. William A. Galston, *Liberal Government, Civil Society, and the Rule of Law*, 23 *YALE L. & POL'Y REV.* 15, 23 (2005).

3. *Id.* at 22. Galston writes that “Schuck knows” that “the line between protection and promotion is not so bright,” *id.* at 21, but goes on to suggest, through the example of public school integration, that I sometimes overlook this fact. As I explain in the next paragraph, we agree on that particular example, so the problem is in my exposition of the distinction.

government and free civil society is too sharp to sustain,"⁴ but I do not mean to draw this distinction as sharply as that.⁵ As I point out, there is much for an activist government to do in cultivating a society that values diversity, and promoting tolerant, inclusive schools, both public and private, is among the most important. However, I also point out—and Galston agrees—that a government that truly values diversity must also protect the right of its law-abiding citizens, through private schools or otherwise, to promote other conceptions of the good, including those that are less tolerant and inclusive.⁶

Finally, I see nothing inconsistent, much less "alarmist," in both defending diversity and stating that "the challenges to national unity are probably greater [today] than at any time since the Civil War."⁷ After all, immigrants currently constitute a steadily-growing share of America's population,⁸ the traditional assimilationist ethos is under strong attack from many quarters,⁹ and state-mandated affirmative action has received the Court's imprimatur.¹⁰ As I indicated in *Diversity in America*'s final sentence, however, I believe that "no other society in history has been better equipped to [meet these challenges] than twenty-first-century America"¹¹—particularly if we follow the precepts that I set forth in the book's concluding chapter.

4. *Id.* at 22.

5. He is wrong to suggest, through a rhetorical question, *id.*, that I might oppose a local government's effort to promote same-sex public schools as a solution to certain educational problems. As he notes, I strongly support such schools and would have government protect them. SCHUCK, *supra* note 1, at 326. His perplexity on this point is understandable, however, given that I sometimes draw the protection/promotion distinction too sharply when moving from specific examples to general exposition.

6. Galston notes that I do not discuss *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983), and wonders whether I think that the decision is consistent with my neutrality-based approach. Galston, *supra* note 2, at 20-20. I am inclined to think that the Court, in upholding the Internal Revenue Service's ruling that denied tax-exempt status to the racially discriminatory university, reached the correct result on the particular facts of that case. More specifically, I agree with Robert Cover that our commitment to ending government-aided racial discrimination is historically and constitutionally unique and therefore rightfully trumped the University's claim to autonomy. See Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 64-67 (1983). Like Cover, however, I share Justice Powell's unease, expressed in his concurring opinion, over interpreting the Code to demand that organizations, in order to retain tax-exempt status, conform to the "declared position of the whole government." 461 U.S. at 609-10 (quoting the opinion of the Court, *id.* at 598). As Powell noted, tax exemption for nonprofit groups is an important means of protecting a diverse civil society against the force of government "orthodoxy." *Id.* Indeed, one can view the IRS's tax-exemption policy as one that promotes diversity, not merely protects it, which of course serves to reinforce Galston's point that the distinction can be blurry.

7. SCHUCK, *supra* note 1, at 99.

8. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 50 tbl.48 (2003), available at <http://www.census.gov/prod/2004pubs/03statab/pop.pdf> (last visited Oct. 16, 2004).

9. See, e.g., PETER D. SALINS, *ASSIMILATION, AMERICAN STYLE* (1997).

10. See *Grutter v. Bollinger*, 539 U.S. 306 (2003).

11. SCHUCK, *supra* note 1, at 337. If Galston views this as alarmist, one wonders what he must think of Samuel Huntington's recent book, which betrays distressingly little confidence in America's continuing integrative capacity. See SAMUEL HUNTINGTON, *WHO ARE WE?: THE CHALLENGES TO AMERICA'S IDENTITY* (2004).

ROBERT POST

Although my incisive colleague Robert Post probably disagrees with me on the merits of affirmative action, he does not directly confront this issue. Instead, he offers a characteristically nuanced, interesting, and convincing reading of *Grutter v. Bollinger*¹² to show that my critique of the kind of diversity-based affirmative action defended by Justice Powell in *Regents of the University of California v. Bakke*¹³ has been overtaken by events—that, in a sense, I am fighting the last war. *Grutter*, Post says, renders my critique anachronistic by offering three new justifications for affirmative action in university admissions: (1) functional necessity (i.e., the importance of a diverse workforce), (2) the need to prepare people for citizenship by facilitating broader participation in the public culture, and (3) the need to maintain legitimacy by providing visible pathways to social leadership.¹⁴ These rationales, Post maintains, are “quite distinct” from, and go “far beyond” those, that Powell offered in *Bakke* and that I challenged in my book.¹⁵

Here, Post’s reading of Schuck is not as careful as his reading of *Grutter*. He writes that I do not analyze the “empirical” and “far-reaching” functional argument for affirmative action—the idea that diversity promotes learning and prepares students to be professionals in a diverse workforce and society.¹⁶ But there is nothing new about this justification—it is at the very center of Powell’s *Bakke* opinion¹⁷—and *Diversity in America* addresses it head-on, unpacking it into three conceptual/empirical/functional questions: What does diversity mean in the higher-education context? What is it about a group that accounts for its diversity-value? What diversity-value do the groups favored by affirmative action programs actually create?¹⁸ My formulations of, and answers to, these questions are complex,¹⁹ but each leads to this conclusion about the functional diversity rationale: “[O]ne is left with serious doubts about its coherence and persuasiveness. There is something to it, surely, but not much. Recognizing this problem, some advocates [including Post] seek to reconceptualize diversity as something else.”²⁰

Grutter’s second justification, which Post sees as analogous to his own, earlier-explicated concern for “the health of public culture,”²¹ and its third

12. 539 U.S. 306 (2003).

13. 438 U.S. 265 (1978).

14. Robert C. Post, *Affirmative Action and Higher Education: The View from Somewhere*, 23 YALE L. & POL’Y REV. 25, 26 (2005).

15. *Id.*

16. *Id.* at 27.

17. 438 U.S. at 311-15.

18. SCHUCK, *supra* note 1, at 163.

19. *Id.* at 163-69.

20. *Id.* at 169.

21. Post, *supra* note 14, at 27.

justification, which is a need that “the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity,”²² are also not new to the Court. Recall that Powell in *Bakke* affirmed that the nation’s future depends upon leaders trained through wide exposure to the ideas and mores of diverse students.²³ The question of novelty aside, these justifications really boil down to the question of democratic legitimacy. Indeed, it is fair to say that legitimacy is the leitmotif of Post’s comment here and of his earlier defense of affirmative action.²⁴

In making this discursive move, of course, Post has lots of good company. For many legal scholars, the invocation of legitimacy is not merely a handy rhetorical trope. It also serves as an indispensable prop, a kind of all-purpose, gap-filling, *deus ex machina* that we often use to rescue arguments that lack much empirical support or merely reflect our deeply-felt preferences.²⁵ We can all readily agree that any sound democratic regime must be perceived as legitimate in the sense that those subject to it accept and feel bound by its law *because* it is its law, quite apart from whether they agree with its merits. But what is far less clear, putting aside the *ipse dixit*s of its proponents, is that affirmative action, as distinguished from non-discrimination,²⁶ is necessary for democratic legitimacy—or indeed that the policy even conduces to this legitimacy.

There is no evidence that Americans, including those favored by affirmative action, did not view the United States as a legitimate regime until the policy became widespread in the mid-1970s, nor is there evidence that citizens of California and Washington, which have abolished affirmative action in public programs, regard their governments as any less legitimate than do the citizens of other states that have retained affirmative action. The vast majority of Americans, including more than a third of blacks and more than seventy percent of Hispanics, oppose racial or ethnic preferences in hiring and promotion, and this level of opposition has risen somewhat over time.²⁷ In short, Americans obviously do not think that legitimacy requires racial or ethnic preferences.

22. *Grutter*, 539 U.S. at 332.

23. *Bakke*, 438 U.S. at 311-15.

24. Robert Post, *Introduction: After Bakke*, in *RACE AND REPRESENTATION: AFFIRMATIVE ACTION* 13, 22-24 (Robert Post & Michael Rogin eds., 1998).

25. I saw “we” because sometimes I too invoke the notion of legitimacy, albeit usually to express skepticism about our ability to know its absence when we see it, except perhaps in revolutions or other extreme cases. See, e.g., Peter H. Schuck, *Regulating Guns Through Litigation*, in *SUING THE FIREARMS INDUSTRY* (T. Lytton ed., forthcoming 2005); Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and the Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325, 1379-84 (1987).

26. This distinction is central to my analysis of affirmative action. SCHUCK, *supra* note 1, at 136-39.

27. *Id.* at 170. The discussion there acknowledges the necessary caveats and refinements concerning the significance of the survey evidence on affirmative action.

Let me be clear. The fact that many Americans support affirmative action, some ardently, is an altogether different matter from whether they regard a polity that lacks affirmative action as illegitimate. So far as I know, supporters of affirmative action have not protested its abolition in certain states by engaging in the kind of civil disobedience or mobilized actions which, during the 1950s and 1960s, signaled the widespread perception that regimes practicing Jim Crow or denying the vote to blacks were illegitimate. Substantial disagreement with a policy, even on moral grounds, does not thereby make the policy illegitimate. If it did, no diverse democratic polity would be legitimate. Accordingly, when affirmative action advocates like Post insist that the policy is necessary to democratic legitimacy, what they really mean is that they feel very strongly about it.²⁸ Their opponents, of course, feel just as strongly, yet this fact does not render *Grutter* or laws authorizing affirmative action illegitimate.

Post's most serious criticism of my affirmative action analysis, however, is not that *Grutter* makes it anachronistic or that I have given short shrift to legitimacy concerns. More importantly (and perhaps of a piece with these other criticisms), he thinks that I do not view the possible demise of affirmative action "from the particular perspective of minority groups, who *Grutter* believes will interpret their exclusion from elite educational institutions as evidence of exclusion and denigration,"²⁹ but that I instead focus on the anger and resentment of working class whites.³⁰

In fairness, I would put my point differently—as *Diversity in America* in fact does. The immediate losers from our existing affirmative action preferences in higher education—those who do not gain admission to the institution in question because the program's preferences do not include them as favored minorities—include far more than just working class whites. Assuming that applicants do not misrepresent themselves or otherwise "game" the system, this means that the excluded include, among others: (1) all whites (not just working-class ones); (2) the forty-eight percent of Hispanics, similar proportion of Asians, and eighty percent of Native Americans who self-identify to the Census Bureau as white, (3) anyone else (dark-skinned Middle Easterners, for example) who is not considered a member of the "ethno-racial

28. In my book, I put Post's legitimacy/diversity justification for affirmative action another way: But this discursive move is really an effort to change the subject; it defends racial preferences not as a way to enrich the experiences of students and teachers but as a remedy for social inequalities and generalized discrimination. That the Supreme Court has expressly and repeatedly prohibited this general remedial justification, of course, is not a conclusive argument against it; the Court, after all, is notoriously fallible. My point, rather, is that the diversity rationale is weak even in its own terms.

Id. at 169. The Court in *Grutter* apparently did not abandon its view that general remedial justification is constitutionally insufficient.

29. Post, *supra* note 14, at 29.

30. Post, *supra* note 14, at 30-29.

pentagon,”³¹ and (4) the more than seven-million people (many with black ancestry) who consider themselves multi-racial and wish to be identified as such (if they must be racially identified at all).³² *Prima facie*, at least, members of these four groups are as deserving of special treatment as non-black members of the ethno-racial pentagon.³³

But as my use of the phrase “immediate loser” suggests, affirmative action creates longer-term and more diffuse losers as well—and these are far more numerous. As *Diversity in America* points out, affirmative action is in important senses a zero-sum game; it

not only pits favored groups against nonfavored groups as they compete for a fixed set of resources or advantages . . . but it also pits each favored group against the other favored groups. Blacks’ success in gaining a preference is at the expense, not only of whites, but also of Hispanics, Asians, and other preference-eligible groups—and vice versa.³⁴

Affirmative action’s other cost-bearers are in some ways, and in the aggregate, even more important. *Diversity in America* provides an extended accounting of these costs. They include the large financial and psychological costs to the tragically high proportion of affirmative-action beneficiaries who drop out of selective institutions where they cannot compete academically;³⁵ the pervasive dissimulation and deformation of thought on all sides due to the felt need to deny or ignore the fact that racial preferences play a large, often decisive role in many admissions decisions (which is reflected in the poor academic performance and high drop-out rates of many beneficiaries); the insidious innuendo about the deserts of almost all but the most unquestionably superior performers in the preferred group (and perhaps even of them), innuendo that tends to perpetuate the very stereotypes that affirmative action is supposed to dispel; and the relentless racialization of discourse on a vast range of public and private subjects, some of which have little or nothing to do with race.³⁶

It is very wrong, then, for Post to say that *Grutter*’s concern with “how minorities will regard their place in America” is “largely absent from *Diversity*

31. The term is David Hollinger’s. See SCHUCK, *supra* note 1, at 8, 24, 47, 103-04, 139.

32. *Id.* at 144-45.

33. Affirmative action programs targeting only blacks would be much more defensible than the existing programs. *Id.* at 186-87. I also consider other alternatives to existing programs. *Id.* at 186-98.

34. *Id.* at 176.

35. A very recent analysis finds that blacks admitted to law schools under affirmative-action preferences have much lower law-school grades, graduation rates, and bar passage rates. See Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. (forthcoming Nov. 2004). For a sharp critique of Sander’s prediction of what would happen absent affirmative action, see David L. Chambers et al., *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander’s Stanford Law Review Study*, 57 STAN. L. REV. (forthcoming Nov. 2004); see also John Hechinger, *Critics Assail Study of Race, Law Students*, WALL ST. J., Nov. 5, 2004, at B1.

36. SCHUCK, *supra* note 1, at 179-82.

in America.”³⁷ In fact, the very aim of the book’s long discussion of affirmative action is to demonstrate that minority groups’ self-perception of their place in America depends in large part upon their objective social circumstances and prospects³⁸ and not on a program that many of them oppose, that benefits only a tiny fraction of the members of each group, that imposes diffuse but significant costs on all group members (even the few beneficiaries), that deforms our public and private discourse, and that undermines our ideals of merit and legal equality. If minorities’ view of their place in America truly depended on affirmative action, their plight—and that of the society as a whole—would be far worse than it is.

Post’s final criticism relates to my argument that affirmative action, where it is permitted, should be transparent, an argument that he says is animated by my fear “that opacity will fuel white resentment.”³⁹ He goes on to draw an interesting contrast between my desire for transparency and the *Grutter* Court’s insistence on what he calls “highly opaque processes of implicit individual comparisons,” pointing out that “*Gratz v. Bollinger*, the companion case to *Grutter*, actually rejects the undergraduate affirmative action plan of the University of Michigan precisely *because* of its transparency.”⁴⁰ Post seems to agree with the Court when it “demands that social integration [through preferences] be visible so as to send a message of inclusion, but . . . insists on deliberately obscurantist processes of individualized consideration so as to prevent inclusion from modulating into a regime of group entitlements.”⁴¹

Having already explained that white resentment is not a major reason why I oppose affirmative action, it remains for me to explain that my concern for transparency has nothing to do with white resentment. Here is the entirety of my rationale for transparency:

The first condition, transparency, is designed to discipline the granting of preferences by forcing institutions to be more candid about their value choices and by triggering reputational, market, and other informal mechanisms that make the entity bear more of the costs of adopting preferences instead of shifting them to innocent third parties. Customers, students, alumni, investors, journalists, and other interests to which the entity must be attentive can then hold it accountable, rewarding, punishing, or ignoring the preferences, as they see fit.⁴²

37. Post, *supra* note 14, at 31-30.

38. For blacks—the only large minority whose statistics are not greatly affected by post-1965 immigration—these conditions and prospects were dramatically improving before affirmative action, and have continued to improve since. SCHUCK, *supra* note 1, at 174, 200-01 (citing, *inter alia*, ORLANDO PATTERSON, *THE ORDEAL OF INTEGRATION: PROGRESS AND RESENTMENT IN AMERICA’S “RACIAL” CRISIS 15-82* (1997)).

39. Post, *supra* note 14, at 30.

40. *Id.*

41. *Id.* at 31.

42. SCHUCK, *supra* note 1, at 196-97. I go on to urge transparency in the case of legacies (which I expressly oppose in the book) and other kinds of nonracial preferences as well, though it is doubtful that federal law can or should compel disclosure in those situations, and to note that transparency is neither a panacea nor without problems of its own. *Id.* at 197.

I couldn't have said it better myself.

JAMES LINDGREN

Although I had hoped that Jim Lindgren would discuss my analysis (in chapter 2) of the many different ways of thinking about diversity as an abstract concept,⁴³ he could not resist the temptation to discuss his own empirical data on diversity in higher education in general and on law school faculties in particular.⁴⁴ We are all the richer for his digression, for his data expose the arrant, almost comical, inconsistency in the position of elite law school faculties on the issue of diversity-seeking affirmative action.

Note that I say inconsistency, not hypocrisy. Lindgren's discussion does not advance any theory of what motivates faculties in their appointments decisions. Rather, his analysis merely highlights the disparity between the heterogeneity in faculty viewpoints and partisan affiliations that one would expect a genuine commitment to diversity to produce and the homogeneity that actually exists.⁴⁵ This disparity is much too large and ubiquitous to be a random phenomenon. Moreover, it is particularly striking in light of the pride that we law professors take in our own logic and consistency.

This inconsistency between elite professors' avowed commitment to diversity and the evident lack of it on our faculties may reflect not so much hypocrisy as confusion or lack of candor about what diversity means and entails, problems that I hope my book will reduce. If, as I suggest in my chapter 5 and as Lindgren believes, affirmative action in this realm is less about promoting diversity than about rectifying the wrongs perpetrated by slavery and racism,⁴⁶ then the emphasis on hiring blacks might make more sense. In that event, however, the scholarly commitment to truth-telling and candor requires proponents of affirmative action to articulate the goals that actually motivate them so that their opponents can engage with their true arguments. Lindgren and I emphatically agree on this imperative.⁴⁷ We also agree, I think, that the current versions of affirmative action in faculty hiring would not survive such an engagement.

VICKI BEEN

Professor Been, as is her wont, makes some telling points. She notes that

43. SCHUCK, *supra* note 1, at 19-39.

44. James Lindgren, *Conceptualizing Diversity in Empirical Terms*, 23 YALE L. & POL'Y REV. 5 (2005).

45. *Id.* at 8-10. One virtue of Lindgren's data and analysis is that they illuminate the empirical relationship among the diversities of partisan affiliation, religion, and viewpoint.

46. SCHUCK, *supra* note 1, at 151-52; Lindgren, *supra* note 44.

47. SCHUCK, *supra* note 1, at 332-33; Lindgren, *supra* note 44.

the federal, state, and local governments pervasively regulate housing and the configuration of residential communities—so much so that “it is simply impossible to imagine what neighborhoods would have looked like in a ‘free market’ that left residential choices up to consumers.”⁴⁸ I agree, and provided a long list of examples of this fact.⁴⁹ Indeed, we both might have added that the most important influences on residential communities include not only housing, transportation, infrastructure, and tax programs, but also education policies that profoundly affect locational choices and property values.⁵⁰

After Been observes, as I also do,⁵¹ that housing is the largest asset that most Americans possess, and an asset that they are determined to protect, she writes that “conspicuous in its absence” is the further point that “segregation pays—it props up the value of housing for white Americans.”⁵² Not only does *Diversity in America* make this point, its three housing case studies are detailed explorations of precisely how white (and non-white) Americans behave in light of these market incentives to segregate their neighborhoods, and of how the law attempts to counteract these efforts.⁵³

Professor Been also emphasizes that exclusionary zoning, a special form of government regulation of housing markets, encourages and reinforces residential segregation by class, and hence by race.⁵⁴ As my analysis of the Mount Laurel case study makes clear, I concur.⁵⁵ I am less certain about her further claim that “some, and perhaps much, of exclusionary zoning is less about ensuring the social class of newcomers, and more about rent-seeking—trying to expropriate the wealth of new entrants—as a ‘price of admission.’”⁵⁶ I am uncertain because, as an empirical matter, these two phenomena, classism and rent-seeking, may be impossible to disentangle. It seems likely, after all, that those who wish to exclude lower-class buyers *also* want to maximize their selling price, and even if classists and rent-seekers differ, their conduct may be

48. Vicki Been, *Residential Segregation: Vouchers and Local Government Monopolists*, 23 YALE L. & POL’Y REV. 33, 35-34 (2005). I assume that by “left residential choices up to consumers,” she is not denying that consumers ultimately have those choices, but instead means that their choices are significantly shaped and constrained by a variety of governmental policies. I certainly agree.

49. SCHUCK, *supra* note 1, at 205-06.

50. See, e.g., CAROLINE M. HOXBY & ILYANA KUZIEMKO, ROBIN HOOD AND HIS NOT-SO-MERRY PLAN: CAPITALIZATION AND THE SELF-DESTRUCTION OF TEXAS’ SCHOOL FINANCE EQUALIZATION PLAN (Nat’l Bureau of Econ. Research, Working Paper No. 10722, 2004), available at <http://papers.nber.org/papers/w10722.pdf> (last visited Oct. 16, 2004).

51. SCHUCK, *supra* note 1, at 205 (“The typical homeowner is very undiversified in an economic sense. Housing represents the single most costly item that most consumers will ever purchase (or rent) and becomes by far their greatest asset. . . . Housing is among Americans’ most important sources of enjoyment, security, and emotional well-being. . . . Once a home is acquired, real or perceived threats to its value can create genuine financial and psychological risks to the family that owns it.”).

52. Been, *supra* note 48, at 37.

53. SCHUCK, *supra* note 1, at 218-60.

54. Been, *supra* note 48, at 38.

55. SCHUCK, *supra* note 1, at 219-27.

56. Been, *supra* note 48, at 38.

indistinguishable. Accordingly, I see no basis for her questioning my belief that classism explains much residential segregation.

Professor Been states that my support for Section 8 housing vouchers “simply ignores”⁵⁷ the inadequate government funding for the program, arguing that the federal government has not expanded Section 8,⁵⁸ that local governments resist programs that attract poor people, and that the states do not like to fund this type of housing.⁵⁹ The facts contradict her. Congress has increased appropriations for Section 8 contract renewals and for new Section 8 vouchers from just under \$11 billion in 2000 to almost \$13.5 billion in 2001, over \$15 billion in 2002, \$16.5 billion in 2003, and \$19 billion in 2004.⁶⁰ Been correctly notes that a “race to the bottom” dynamic always threatens state and local funding for programs targeted at the mobile poor,⁶¹ but it is also true that some countervailing forces operate⁶² and that states and localities with large poverty populations often fund such programs nonetheless.⁶³

To my claim that government should resist promoting new diversities rather than protecting existing ones, Professor Been replies by asking whether promoting racial and class integration in housing is best thought of as seeking a new diversity or as an effort to undo the segregative effects of long-standing public policies.⁶⁴ This is a good question. My clear answer in *Diversity in America* is that ending racial discrimination in housing is a compelling responsibility of government, but that using law to contrive the integration of housing by economic class is more ambiguous morally and difficult practically.⁶⁵

An equally important question is how these two goals are best achieved. My answer is that the former requires more vigorous and imaginative

57. *Id.* at 37.

58. She states that the Bush administration is “drastically cutting back on the program,” *id.*, evidently referring to proposals to change the pivotal fair-market rent formula. That trial balloon, however, seems to have been deflated. See David W. Chen, *Under Pressure, HUD Ends Shift on Home-Aid Formula*, N.Y. TIMES, Sept. 28, 2004, at B3.

59. Been, *supra* note 48, at 37.

60. Nat'l Low Income Hous. Coalition, *HUD FY2005 Budget Chart for Selected Programs*, at <http://www.nlihc.org/news/101304chart.htm> (Oct. 13, 2004).

61. Been, *supra* note 48, at 37.

62. For a brief discussion of this issue, see PETER H. SCHUCK, *THE LIMITS OF LAW: ESSAYS ON DEMOCRATIC GOVERNANCE* 106 (2000).

63. The State and City of New York are leading examples, particularly for such programs as Medicaid. See, e.g., Jennifer Steinhauer, *In Long Look at City Costs, Tax Rebates Are on Few Lips*, N.Y. TIMES, July 16, 2004, at B3 (“Mayor Michael R. Bloomberg yesterday warned of ballooning pension, Medicaid and debt costs facing New York City over the next four years.”); Barbara Whitaker, *Back Home, in Westchester*, N.Y. TIMES, May 9, 2004, § 14WC (Westchester Weekly Desk), at 1 (“New York is one of only two states in the country that requires counties to pick up part of the cost of [Medicaid] and New York has a particularly rich offering of services it covers.”). See generally E.J. McMahon, Manhattan Inst. Ctr. for Civil Innovation, *New York State Government: Growing Beyond Its Means*, at http://www.nyfiscalwatch.com/html/fwm_2004-04.html (Jan. 22, 2004).

64. Been, *supra* note 48, at 38.

65. SCHUCK, *supra* note 1, at 219-60.

enforcement of fair housing laws, that the latter is aided by policies that encourage economic mobility by minorities and others, and that both can be advanced by expanding and reforming Section 8.⁶⁶ Professor Been's brief comment here is no place to provide her own answer to this hard question, but we can infer her general approach. She claims that land use regulation is a rent-seeking monopoly run in the interests of existing residents and criticizes me for "leaving the existing system of land use regulation essentially untouched."⁶⁷ This suggests that she would promote racial and class integration in neighborhoods by restricting the broad discretion now enjoyed by land use regulators.

Been's distinguished work, however, demonstrates the severe constraints on the political feasibility and practical effect of such proposals. These constraints reflect deeply embedded social structures discussed in *Diversity in America*: the geographic mobility of white and middle-income taxpayers and voters, the fact that their homes account for most of their net worth, their widespread adherence to classist norms, the largely local financing of public schools, the urban-suburban divide, the recalcitrant features of federalism, and so forth.⁶⁸ Been wisely reminds us of "the connections between residential segregation and almost every other social problem we confront today."⁶⁹ Although this segregation has declined rapidly for Asians and Hispanics, it remains very widespread for blacks.⁷⁰ The persistence of their neighborhood segregation marks one of our most conspicuous and tragic failures.

PETER SKERRY

Peter Skerry highlights several important structural and ideological developments in American public life.⁷¹ Agreeing that our politics is highly decentralized, he nonetheless points to some centralizing trends, including a rights revolution that demands equality among individuals without regard to where they happen to live.⁷² To a significant degree, this revolution has been driven by public interest groups whose organizational wellbeing often requires them to generate conflict, move it to higher levels of government, and brandish principles that are harder to compromise. Skerry has written widely and wisely on the nature and implications of this kind of politics.⁷³

66. *Id.* at 259-60, 324-25, 328-31.

67. Been, *supra* note 48, at 39.

68. SCHUCK, *supra* note 1, at 203-18.

69. Been, *supra* note 48, at 39.

70. SCHUCK, *supra* note 1, at 208.

71. Peter Skerry, *Choice, Conflict, and the Zero-Sum Game of Identity Politics*, 23 YALE L. & POL'Y REV. 65 (2005).

72. *Id.* at 69-66.

73. See, e.g., PETER SKERRY, MEXICAN AMERICANS: THE AMBIVALENT MINORITY (1993).

I am less certain than Skerry seems to be, however, that “pluralistic bargaining is much less in evidence than it used to be.”⁷⁴ He believes, along with many other analysts, that our politics is “more contentious than ever.”⁷⁵ American history refutes this notion. Among the founding generation, for example, high-stakes polarization was the order of the day, demonstrated by the ubiquity of scurrilous and defamatory character assassination, verbal invective, physical threats, actual violence (on the floor of Congress and in fatal duels), and accusations of treason, incest, debauchery, and real or imagined conspiracies and corruption.⁷⁶ The politics of the founding generation, as well as the politics surrounding the Civil War and Reconstruction, make ours seem (as George Washington Plunkitt of Tammany Hall would have said) like beanbag.

Identity politics can be pernicious and corrosive, for all the reasons discussed by Skerry.⁷⁷ But the contentiousness of today’s politics, I believe, has less to do with identity politics than with more systemic changes: technologically feasible redistricting practices that create safe seats for legislators; control of the parties by activists who bear little resemblance to the median voter; the high stakes of the post-9/11 war on terror; a media that thrives on and sometimes engenders conflict; the parties’ dwindling control over candidate selection and campaign finance; the more entrepreneurial, free-wheeling candidacies that this weak-party environment nourishes; and courts that more readily (if not eagerly) assume large political responsibilities while lacking the political resources necessary to discharge them effectively and reduct conflict. While sharing most of Skerry’s criticisms of identity politics, I suspect that he has the causality backwards—or that he has at least substantially over-simplified the situation. That is, identity politics is as much a consequence of these more systemic factors as it is their cause.⁷⁸

Finally, some more benign forms of identity politics may be a necessary prelude to the political integration of newcomers into a sometimes unwelcoming, diverse society. This is certainly a familiar dynamic in the history of American immigration. In my book, I note that “immigrants who want to facilitate healthy assimilation by their children must try to use the cultures of origin to inoculate them against the dangerous aspects of American life, providing a cultural shelter and breathing space in which their youngsters can flourish.”⁷⁹ Skerry knows this, of course, and presumably wants the good

74. Skerry, *supra* note 71, at 72.

75. *Id.* at 69.

76. *See, e.g.,* JOANNE B. FREEMAN, *AFFAIRS OF HONOR: NATIONAL POLITICS IN THE NEW REPUBLIC* (2001).

77. Skerry, *supra* note 71, at 70-68.

78. This is surprising because Skerry has demonstrated in his own work this dependence of identity politics on factors of this kind. *See, e.g.,* SKERRY, *supra* note 73.

79. SCHUCK, *supra* note 1, at 102.

identity politics without the bad. So do I, but I also want to believe in no-cal chocolate cake.

STEPHEN MACEDO

In asking “[h]ow it could be a public value to be neutral among public values and various religious and other non-public values,”⁸⁰ Professor Macedo seems to think that this would be a self-evident contradiction. I do not see why. We have many public values, and what he calls civic neutrality is one of them, fortified by the special constitutional status that the First Amendment gives to religious liberty and non-establishment—a status that helps justify a position that Macedo finds unequal and unfair: that the state must accommodate (but not “establish”) religious beliefs and practices even when it might not have to accommodate their secular counterparts.⁸¹

This is distinct, of course, from the questions of what neutrality means and whether government can ever really achieve it. On the latter, I am clear: Strict state neutrality “is in an important sense illusory” because “[r]eligion is inevitably political in . . . shap[ing] our public and private values.”⁸² Macedo, I believe, agrees. The former question—what does neutrality mean?—cannot fruitfully be spelled out in the abstract but must, as Macedo acknowledges, be derived more or less casuistically from our stance in particular disputes.⁸³

Macedo says that “it is way too simple” of me to characterize the debate between accommodationists and separatists as being over whether the state is more threatened by religion or whether the opposite is true.⁸⁴ It would indeed be simplistic *if* that were how I characterized the debate, but I do not.⁸⁵ What *is* simplistic is to say, as Macedo does, that what accommodation puts at stake is not “the state” (I do not say this or even know what it would mean in this context) but “democratic self-governance.”⁸⁶ His argument here seems to be that requiring government to meet a demanding standard of justification before it can burden religion is somehow anti-democratic, but this is no more (or less) anti-democratic than imposing any other constitutional constraint on majorities, as with judicial decisions invalidating laws that limit freedom of speech.

80. Stephen Macedo, *Uncivic Diversity*, 23 YALE L. & POL’Y REV. 41, 41 (2005).

81. As Macedo notes, I would not require accommodation if that would violate a compelling state interest, but he thinks that I would not also require that the law be narrowly tailored. *Id.* at 44-42. In fact, narrow tailoring complements the compelling state interest standard; I would require both.

82. SCHUCK, *supra* note 1, at 277.

83. Macedo, *supra* note 80, at 42. It is odd, then, that Macedo thinks I believe “that announcing broad principles that limit the reach of public values is helpful to managing this complex interface.” *Id.* at 49. Quite the contrary.

84. *Id.* at 45.

85. SCHUCK, *supra* note 1, at 276-83.

86. Macedo, *supra* note 80, at 45.

Macedo criticizes my position on the *Mozert* case⁸⁷ and asks what would be necessary to show that the state had a “compelling” interest in requiring the children of fundamentalist Christian parents to participate in a public school reading program designed to teach tolerance, which the parents said contradicted their understanding of God’s word and would thus lead their children astray.⁸⁸ My answer is that the state might be able to show that the alternative actually proposed by the parents in *Mozert*—that their children use other state-approved texts, cover any missed work at home, and take the same reading tests as other students⁸⁹—failed to protect both the state’s compelling interest in assuring students’ reading proficiency and its equally compelling interest in teaching tolerance, which (the state might be able to show) other parts of the curriculum would not satisfy.⁹⁰

I agree with his view that public schools have a compelling interest in not teaching every view, however irrational, that a group of citizens might hold, and he is right that my sentence on flat-earthism that he quotes is infelicitous and downright confusing.⁹¹ What I meant there was that disputes over what should and should not be taught in the public schools would be eased (not eliminated) if parents were allowed to use the state’s tax-supported tuition dollars in schools of their choice, which might have diverse pedagogical approaches. But I am clear that this would not prevent the state from regulating curriculum: “Just as the government has a right and a duty to enforce public standards of legality and safety, it can properly insist that the schools it supports meet minimum levels of curricular coverage (including civics instruction) and educational effectiveness.”⁹²

Macedo thinks that questions like school choice are “questions of public policy ... that should not be settled by judicial fiat” and that school choice and charitable choice are not constitutionally required.⁹³ Because I emphatically agree, it is a mystery why he thinks that I favor “a thick new layer of constitutional limitations on democratic public authority.”⁹⁴ Nothing could be further from the truth. I also agree, as just noted, that faith-based organizations receiving public funds “should be subject to the same reasonable regulations as

87. *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987).

88. Macedo, *supra* note 80, at 45-44.

89. SCHUCK, *supra* note 1, at 280; see also STEPHEN MACEDO, DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY 159-60 (2000).

90. Macedo is wrong to say that I find *Mozert* “an easy case.” Macedo, *supra* note 80, at 47. In fact, it is a difficult case, which is one reason why it has attracted much commentary. See, e.g., Nomi Maya Stolzenberg, “He Drew a Circle That Shut Me Out”: Assimilation, Indoctrination, and The Paradox of a Liberal Education, 106 HARV. L. REV. 581, 582-611 (1993).

91. *Id.* at 45-43 (quoting SCHUCK, *supra* note 1, at 282).

92. SCHUCK, *supra* note 1, at 306.

93. Macedo, *supra* note 80, at 48.

94. *Id.* at 50.

other schools and service providers that accept public funding,”⁹⁵ that if they are unwilling to abide by those regulations they must not be permitted to participate in the program,⁹⁶ and that social services and schools supported by public funds may not mandate religious exercises for all.⁹⁷

Challenging my statement that “the claim that a public school monopoly is necessary to promote these [civic] ideals has no empirical support and is refuted by the experience of other democracies where governments pay private school tuition for large numbers of students,”⁹⁸ Macedo points out that the foreign systems include robust regulatory frameworks.⁹⁹ As already noted, however, I too call for reasonable regulation in school choice systems. And Macedo does not mention, although he has reluctantly conceded (in an endnote) the point in an earlier work,¹⁰⁰ what immediately follows my reference to the foreign systems, namely that

private schools and religious schools are *more* successful than public schools at teaching civic virtues, community service, tolerance—and even feminism!—and that these teachings seem to persist into students’ adult years. Even more striking, and perfectly predictable, is the fact that private schools in communities with choice are more integrated both racially and by income than the public schools there. After all, public school enrollments both reflect and reinforce the racial isolation of neighborhoods. Choice systems, in contrast, aim to decouple good schooling from residence.¹⁰¹

Finally, Macedo attributes to me the absurd view that “[d]iversity is not worth the name unless we accommodate views and practices that ‘threaten’ our own core values.”¹⁰² I neither say nor believe this, of course, and what immediately follows the passage he quotes makes clear that my point is altogether different. I write that the law “compromises the diversity ideal whenever it mediates among religions and between religious and secular values. We can only understand these compromises if we first analyze the general concepts and norms that give them meaning: definition of religion, separation, accommodation, neutrality, judicial review, choice, and establishment by exception.”¹⁰³ In short, our inevitable compromises among clashing public and private values, not our abstract principles, determine what we truly believe about diversity.

95. *Id.* at 47; see also SCHUCK, *supra* note 1, at 306.

96. SCHUCK, *supra* note 1, at 295-96, 308.

97. *Id.* at 296-97, 307.

98. *Id.* at 304-05.

99. Macedo, *supra* note 80, at 49.

100. MACEDO, *supra* note 89, at 324 n.28. I discuss Macedo’s book extensive in chapter 7.

101. SCHUCK, *supra* note 1, at 304-05.

102. Macedo, *supra* note 80, at 50.

103. SCHUCK, *supra* note 1, at 274.

ORLANDO PATTERSON

Orlando Patterson's contribution is as bracing as we would expect from one of our nation's premier sociologists of race and ethnicity, a scholar whose work I cite and quote extensively in *Diversity in America*. Patterson maintains that the civil rights movement was the "single most important factor" in America's growing celebration of diversity.¹⁰⁴ I emphatically agree, as my book makes clear. Indeed, it describes the 1965 immigration reform, a reflection of the civil rights ethos of the day, as perhaps the principal force shaping and legitimating this diversity,¹⁰⁵ and it argues that antidiscrimination law (but not its affirmative action variant) has played an indispensable role in securing legal equality among diverse groups.¹⁰⁶

Patterson wishes that I had given greater attention to the problem of "groups that are themselves exclusive,"¹⁰⁷ but *Diversity in America* does so. It discusses the Supreme Court's decisions allowing the Boy Scouts to maintain their homophobic membership and leadership policy¹⁰⁸ and allowing the Old Order Amish to keep their children out of high school.¹⁰⁹ It defends these decisions as necessary to blunt egalitarian demands that go too far in flattening civil society's heterogeneity by choking off group cultures that the majority finds undesirable.¹¹⁰ He also claims I give short shrift to the decline of the WASP ideal that dominated American culture until recently.¹¹¹ In fact, two chapters of my book both document and celebrate this decline.¹¹²

On the public-private distinction, Patterson suggests that I somehow missed the fact that government is deeply implicated in the construction of the private sphere and has been since the nineteenth century, "not simply since the 1960s."¹¹³ I am well aware of this obvious fact;¹¹⁴ indeed, governments were regulating the private sphere in the colonial era, far earlier than Patterson says. Nor (as I just noted) do I deny government's essential role in combating racial discrimination or its complicity in the holocaust of slavery,¹¹⁵ which Patterson's seminal work has done so much to dissect.¹¹⁶

104. Orlando Patterson, *On the Provenance of Diversity*, 23 YALE L. & POL'Y REV. 51, 51 (2005).

105. SCHUCK, *supra* note 1, at 87.

106. *Id.* at 324-27.

107. Patterson, *supra* note 104, at 52.

108. *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

109. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

110. SCHUCK, *supra* note 1, at 38, 284-85.

111. Patterson, *supra* note 104, at 54-52.

112. SCHUCK, *supra* note 1, at 3-15, 75-133.

113. Patterson, *supra* note 104, at 57.

114. PETER H. SCHUCK, *THE LIMITS OF LAW: ESSAYS ON DEMOCRATIC GOVERNANCE* 419 (2000).

115. SCHUCK, *supra* note 1, at 151, 324-25.

116. See, e.g., ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY* (1982).

Although Patterson agrees with and indeed extends my criticism of the diversity rationale for government-mandated affirmative action, he strongly advocates continuation of the policy on remedial grounds, at least for the near future.¹¹⁷ My extensive discussion of affirmative action relies in part on Patterson's own path-breaking work on the sociology of race in America, yet I reach a very different conclusion on the merits and future of the policy. The interested reader, then, can easily parse our differences about its wisdom and justice. I agree with Patterson in deploring the ways in which conventional discourse about diversity has tended to obscure or even subvert the kinds of social and cultural changes that are needed to help blacks achieve greater equality,¹¹⁸ but as explained in the book, I believe that these concerns militate *against* government-mandated affirmative action rather than for it.¹¹⁹

Patterson accepts my argument that classism carries a very different moral valence among Americans than racism,¹²⁰ but he does not want this difference to be used to sweep the problem of social inequality under the rug.¹²¹ Here too, I strongly concur. I use my discussion of classism, however, to help explain why conventional civil rights law has been ineffective in promoting racial and economic diversity in neighborhoods, not to elide the subject of inequality. Like Patterson, I am deeply troubled by persistent poverty in America, and I have my own views about how it can and cannot be remedied, views that are deeply informed by Patterson's work. It is no cop-out, however, to insist that diversity, not poverty, is the subject of my book.

117. Patterson, *supra* note 104, at 58-56.

118. SCHUCK, *supra* note 1, at 15-16, 198-202; Patterson, *supra* note 104, at 59-58.

119. SCHUCK, *supra* note 1, at 198-202.

120. *Id.* at 324-27.

121. Patterson, *supra* note 104, at 59.

